

BALANCING TRADITION AND INNOVATION: LEGAL FRAMEWORK FOR PROTECTING COMMUNAL INTELLECTUAL PROPERTY IN THE BORDERLESS AGE

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ABSTRACT

The existence of communal intellectual property goes along with the presence of indigenous communities and local societies. Traditional cultural expressions represent one of the four categories of communal intellectual property. As a multicultural nation, Indonesia possesses diverse communal intellectual property. Unfortunately, communal intellectual property rights violations, such as unilateral claims, are prevalent. Given the challenges surrounding communal intellectual property in Indonesia and the rapid advancement of information technology, the author's interest is sparked in conducting an in-depth investigation and analysis of the legal protection of these issues. This study adopts a descriptive normative legal approach, utilizing primary and secondary literature sources for analysis and examination. Through this research, identifying problems leads to a thorough problem analysis and the developing of problem-solving strategies. The findings reveal that the Indonesian government employs a positive and defensive legal framework to protect traditional cultural expressions. Logical justifications for legal protection include societal benefits, national identity and sovereignty, preservation of ancestral heritage, and economic considerations. These measures are crucial in the borderless era, characterized by potential claims, theft, and other forms of infringement.

Keywords: communal intellectual property, indigenous communities, legal protection, traditional cultural expression.

A. Introduction

The current era is characterized by extensive and intensified interactions with the international community, spanning various domains such as politics, social affairs, economics, business, culture, telecommunications, etc. Interactions among nations occur across various sectors, encompassing various domains.¹ These interactions highlight

1 Ariesani Hermawanto and Melaty Anggraini, *Globalisasi, Revolusi Digital dan Lokalitas: Dinamika Internasional dan Domestik di Era Borderless World*, (Yogyakarta: LPPM Press UPN Veteran Yogyakarta, 2020), 1.

the significance of the 21st century as a pivotal period in global development. The advancements in transportation, telecommunications, the internet, and digital technology have fundamentally facilitated widespread and massive global connectivity. Particularly in the digital realm, the impact of technology is pervasive, touching nearly every aspect of life through information and communication technology. Hence, this era is commonly referred to as the digital age.

The internet, along with the rapid progression of information and communication technology, is a cornerstone of the digital era, leading to a shrinking world where national boundaries are becoming less rigid.² As a result, the concept of a borderless society has emerged, enabling countries to establish instantaneous connections and allowing information to be disseminated swiftly between nations. National borders have become less rigid, transforming the world into a borderless place.³ Consequently, the scope of societal interactions and the exchange of information has expanded significantly, transcending the constraints of space and time. This phenomenon has led to the characterization of the present era as the borderless era.

The evolution of human creations parallels the advancements in information technology. The internet and digitalization have revolutionized the nature of physical creations, transforming them into intangible digital forms. The swift progress of information and communication technology has brought about a profound transformation in traditional creations, converting them into digital formats that no longer possess physical manifestations. These immaterial creations manifest as digital works or digital content.⁴ These digital creations encompass various formats compatible with software applications and hardware devices such as smartphones, laptops, tablets, and others.

However, alongside the positive transformations brought about by information technology, there are negative consequences and risks associated with the existence of intellectual creations. The ease of altering, modifying, distributing, and commercializing digital creations without the original creators' permission has led to widespread copyright infringement and violations. The rapid dissemination of information through the internet has contributed to the proliferation of intellectual property-related infringement of intellectual property.⁵ Failure to address these issues adequately can result in substantial losses for copyright holders, companies, and nations.

Therefore, as a sovereign nation governed by the rule of law, Indonesia must harness the potential of intellectual creations while safeguarding them against illegal exploitation

2 *Ibid.*, 80.

3 Kenichi Ohmae, *The Next Global Stage Challenges and Opportunities in Our Borderless World*, (New Jersey: Wharton School Publishing, 2005), 20.

4 Khwarizmi Maulana Simatupang, "Tinjauan Yuridis Perlindungan Hak Cipta Dalam Ranah Digital." *Jurnal Ilmiah Kebijakan Hukum* 10, no. 1 (2021), 68.

5 *Ibid.*

by other countries. Intellectual property rights, commercialization, and legal protection have emerged as significant concerns within the international economic framework.⁶ Consequently, the need to establish legal protection framework for intellectual creation has become an imperative.

As a multicultural country characterized by diverse customs, cultures, and local wisdom, Indonesia possesses a wealth of communal intellectual property. The existence of communal intellectual property in Indonesia is intricately linked to traditional communities, which continue to thrive across the archipelago. Recognizing the substantial economic, social, and cultural value inherent in communal intellectual property, it becomes essential for the state to undertake the inventorying and protection of these valuable assets. Leveraging traditional cultural expressions as national resources holds tremendous potential within creative industries and tourism.

However, the protection of communal intellectual property in Indonesia faces recurring challenges, often manifested through unilateral claims made by other nations. For instance, cases such as the unauthorized use of Indonesia's traditional song "Rasa Sayange" from the Maluku community in promotional videos for Visit Malaysia without the consent of the Maluku community or Indonesia exemplify these issues. Additionally, motifs such as batik parang, Reog Ponorogo, angklung, and the Pendhet dance have been subject to unilateral claims by neighboring countries (re: Malaysia).⁷

Moreover, the violation of communal intellectual property rights also leads to economic losses for traditional artisans in Jepara and Bali as well. Jepara furniture craftsmen are compelled to produce furniture carvings for the foreign company PT. Harrison & Grill-Java. Similarly, foreign individuals residing both within and outside of Indonesia assert copyright ownership over motifs such as batun timun, batun poh, parta ulanda, kuping guling, and jawan, which are integral to Bali's silver carving culture.⁸ The existence of patents granted by the United States for cholesterol-lowering tempe and by Japan for tempe with antioxidant compounds⁹ serves as concrete evidence of the inadequate safeguarding of communal intellectual property in Indonesia.

These infringements lead to economic losses for traditional artisans in Jepara and Bali and threaten the preservation of Indonesia's cultural heritage. Addressing these challenges strengthening legal protections are paramount to safeguarding communal intellectual property from unauthorized exploitation and infringement.

6 Dorvinando Bonanta Simarmata and Albertus Sentot Sudarwanto. "Perlindungan Hukum Karakteristik Ekspresi Budaya Tradisional Berdasarkan Undang-Undang Nomor 28 Tahun 2014 Tentang Hak Cipta." *Jurnal Privat Law* 9, no. 2 (2021): 309-318, <https://jurnal.uns.ac.id/privatlaw/article/viewFile/60039/34998>

7 KholisRoisah, "Perlindungan ekspresi budaya tradisional dalam sistem hukum kekayaan intelektual." *Masalah-Masalah Hukum* 43, no. 3 (2014): 372-379. DOI: 10.14710/mmh.43.3.2014.372-379

8 *Ibid.*

9 Sulasi Rongiyati, "Hak Kekayaan Intelektual Atas Pengetahuan Tradisional." *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 2, no. 2 (2016): 213-238, DOI: 0.22212/jnh.v2i2.214

Given the challenges surrounding communal intellectual property in Indonesia and the rapid advancement of information technology, the author's interest is sparked in conducting an in-depth investigation and analysis of the legal protection of these issues. Specifically, the focus will be on exploring the legal protection of Traditional Cultural Expressions (TCEs), considering their immense value regarding social, cultural, and historical significance. By employing a theoretical legal protection framework, this study aims to provide a comprehensive analysis that sheds light on the complexities and implications of safeguarding TCEs in the digital age.

However, the existing legal framework for safeguarding communal intellectual property in Indonesia remains insufficient, contributing to rampant violations and unilateral claims by foreign entities. The absence of a visible legal structure intensifies the challenges faced in preserving communal intellectual property against unauthorized exploitation. This research aims to bridge this critical gap by conducting an in-depth examination of the legal protection afforded to Traditional Cultural Expressions (TCEs) within the context of Indonesia's digital age. Emphasizing their significant social, cultural, and historical value, this study will employ a theoretical legal protection framework to analyze and propose strategies aimed at reinforcing the defense mechanisms for communal intellectual property.

B. Research Method

This written work utilizes a normative or doctrinal legal research methodology. The research is conducted primarily through a comprehensive review of existing literature, including primary and secondary legal sources.¹⁰ Relevant documents such as legislation, scholarly articles, and other materials related to legal protection, intellectual property rights, communal intellectual property, indigenous communities, and similar topics are collected and examined as reference materials.

This study gathered all information on individuals, phenomena, specific groups, and other relevant aspects to uncover factual evidence (fact-finding). The objective of this research is to identify problem areas (problem finding) that lead to problem identification, enabling the formulation of solutions to address the underlying issues (problem-solving).¹¹ The collected data is subsequently analyzed using qualitative methods, with a particular focus on a statutory approach as the chosen framework.

10 Peter Mahmud Marzuki. *Penelitian Hukum*, (Jakarta : Kencana Prenada Media Group, 2015), 55.

11 Sri Mamudji, Hang Rahardjo, Agus Supriyanto *et.all*. *Metode Penelitian dan Penulisan Hukum*. (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia (2005).

C. Discussions

1. The Presence of Indigenous Communities and Communal Intellectual Property

The existence of communal intellectual property in Indonesia is intricately linked to the presence of indigenous communities. These communities are traditional groups that firmly adhere to their customary values, culture, and local wisdom. It is imperative for the state to safeguard its existence, as underscored by Article 5 of the United Nations Declaration on the Rights of Indigenous Peoples. This provision emphasizes the recognition, protection, and fulfillment of the rights of indigenous communities in political, legal, economic, social, and cultural domains.¹²

Historically, the recognition of indigenous communities in Indonesia can be traced back to the colonial era when the Dutch colonial government held sway. During this period, the Dutch government acknowledged customary law, largely influenced by the critiques of Cornelis van Vollenhoven, an anthropologist. Van Vollenhoven's criticisms, rooted in Savigny's theory, prompted the Dutch colonial government to incorporate customary law as applicable to indigenous communities, alongside the law governing the European population.¹³

Nevertheless, in the early years of the Republic of Indonesia, there was a regression in the acknowledgment of customary law. This phase was characterized by the national uniformity of laws, which resulted in the neglect of customary law.¹⁴ Following the reform era, a paradigm shift occurred from centralized governance to autonomous governance, forming a new basis for developing and protecting indigenous communities in Indonesia. Additionally, the Constitutional Court Decision number 97/PUU-XIV/2016¹⁵ reaffirmed the presence of indigenous communities and local groups within Indonesia.¹⁶

The presence of indigenous communities in Indonesia is inseparable from their customs, culture, and esteemed values. Their existence aligns with the rich tapestry of cultures they possess, giving rise to diverse cultural expressions that constitute an integral part of their identity. Upon closer scrutiny, the lives and cultures of indigenous communities harmoniously coexist with nature. Environmental degradation resulting from scientific and technological progress can be mitigated by harnessing traditional wisdom.¹⁷ Notably, lands

12 Ilham Yuli Isdiyanto and Deslaely Putranti. "Perlindungan Hukum atas Ekspresi Budaya Tradisional dan Eksistensi Masyarakat Hukum Adat Kampung Pitu." *Jurnal Ilmiah Kebijakan Hukum* 15, no. 2 (2021): 231-256, DOI: <http://dx.doi.org/10.30641/kebijakan.2021.V15.231-256>, 235-236.

13 *Ibid.*

14 *Ibid.*, 37.

15 Putusan Mahkamah Konstitusi Nomor 97/PUU-XIV/2016.

16 Muhammad Yusrizal Adi Syaputra, and Mirza Nasution. "Legal protection of the constitutional rights of the indigenous faith believers in Indonesia." (2020), <https://dupakdosen.usu.ac.id/bitstream/handle/123456789/3866/Fulltext.pdf?sequence=1&isAllowed=y>

17 Nuraeni and Rona Ikram Putri. "The International Dimension of Communal and Traditional Intellectual

managed by indigenous communities demonstrate eco-friendly practices and adhere to sustainable principles.¹⁸

Over time, customary practices and culture, as embodiments of traditional indigenous heritage, have engendered the concept of communal intellectual property (CIP) that is rooted in group-based dynamics. The emergence of CIP represents a departure from the individual-centric approach to intellectual property protection prevalent in the Western paradigm. Communal intellectual property encompasses diverse elements, encompassing cultural expressions, traditional knowledge, genetic resources, and geographical indications.

2. Regulation of Intellectual Property, Communal Intellectual Property, and Traditional Cultural Expressions in Indonesia

Communal intellectual property is a newly developed concept derived from the individualistic nature of intellectual property. It has emerged particularly in developing countries characterized by diverse customary practices and creative works within their societies. There exists a contrast between the highly individualistic nature of intellectual property in Western concepts and the communal intellectual property concept rooted in local indigenous communities. This disparity arises because intellectual property originating from developed nations (the West) aims to value individual creativity and monopolize their creations, whereas communal or collective wealth in developing countries is based on natural resources and emphasizes shared solidarity and collective well-being.¹⁹

Therefore, discussing communal intellectual property cannot be separated from intellectual property itself. Intellectual property is the result of an individual's creative work, encompassing arts and literature, including written works such as books, computer programs, databases, technical reports, manuscripts, architecture, maps, translations, and cultural appreciation through visual arts, among others.²⁰ These intellectual works are considered the products of an individual's creativity and possess economic value, granting the creator exclusive rights over their creations. This is because something that can be seen, heard, read, or utilized from an individual's creative work holds commercial value that

Property Rights Protection in Indonesia." *Intermestic: Journal of International Studies* 2, no. 2 (2017): 1, DOI: <http://dx.doi.org/10.24198/intermestic.v2n1.6>, 77.

- 18 Robinson, Jake M., Nick Gellie, Danielle MacCarthy, Jacob G. Mills, Kim O'Donnell, and Nicole Redvers. "Traditional ecological knowledge in restoration ecology: a call to listen deeply, to engage with, and respect Indigenous voices." *Restoration Ecology* 29, no. 2 (2021): 133-41. DOI: <https://doi.org/10.1111/rec.13341>.
- 19 Dewi Sulistianingsih, Yuli Prasetyo Adhi, and Pujiono Pujiono. "Digitalisasi Kekayaan Intelektual Komunal di Indonesia: Digitalization of Communal Intellectual Property in Indonesia." In *Seminar Nasional Hukum Universitas Negeri Semarang*, vol. 7, no. 2, pp. 645-656. 2021. DOI: <https://doi.org/10.15294/snhunnes.v7i2.723>, 650.
- 20 Nita Triana, "Menggagas Hak Kekayaan Intelektual Perspektif Hukum Islam ke dalam Hukum Nasional." *Al-Manahij: Jurnal Kajian Hukum Islam* 12, no. 2 (2018): 177-192. DOI: <https://doi.org/10.24090/mnh.v12i2.1747>.

the creator can monopolize. Hence, based on these grounds, individuals have rights over their intellectual property.²¹

a. Intellectual Property

The concept of intellectual property rights emerged from Anglo-Saxon law. Intellectual property is rooted in a strong moral connection between the creator and their creations. This is because intellectual property relies on the creative capacity and ingenuity of the creator. Consequently, appropriating someone's creative work without providing compensation is considered an unethical and irresponsible action. Such a moral foundation is known as the philosophical basis of natural law in legal theory, as it prohibits the unauthorized acquisition of what rightfully belongs to others.²²

The significance of intellectual property rights cannot be dissociated from the globalization of world trade, exemplified by international conventions and the establishment of global trade organizations like the World Trade Organization (WTO). The concept of intellectual property rights encompasses:²³

- 1) Ownership rights over intellectual creations, which are inherent, permanent, and exclusive to the owner.
- 2) Rights obtained by others with the owner's permission (temporary in nature), such as the right to disclose, reproduce, utilize specific products, or produce specific goods.

On a global scale, intellectual property rights are categorized into two domains:²⁴

- 1) Industrial rights, encompassing patents (including utility patents), trade secrets, trademarks, industrial designs, plant variety protection, integrated circuit layout designs, geographical indications, and indications of origin.
- 2) Copyright.

In the Indonesian context, the regulation of intellectual property is underscored by the country's ratification of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This document logically follows from Indonesia's adherence to the Agreement Establishing the World Trade Organization, which includes provisions on intellectual property. Consequently, in 1994, Indonesia ratified the Agreement Establishing the World Trade Organization (WTO) through Law No. 7 of 1994, officially known as the

21 Ropei, Ahmad. "Formulasi Hukum Perlindungan Hak Kekayaan Intelektual Dalam Kerangka Maqoshid As-Syari'ah." *Jurnal Hukum Ekonomi Syariah* 4, no. 02 (2020): 165-179. DOI: <https://doi.org/10.26618/j-hes.v4i02.4259>, 169.

22 Nita Triana, "Menggagas Hak Kekayaan Intelektual Perspektif Hukum Islam ke dalam Hukum Nasional." *Al-Manahij: Jurnal Kajian Hukum Islam* 12, no. 2 (2018): 177-192. DOI: <https://doi.org/10.24090/mnh.v12i2.1747>, 179.

23 Sulasi Rongiyati, "Hak Kekayaan Intelektual Atas Pengetahuan...", 217.

24 Sulasi Rongiyati, "Hak Kekayaan Intelektual Atas Pengetahuan...", 218.

Ratification of the Agreement Establishing The World Trade Organization (Agreement on the Establishment of the World Trade Organization).²⁵

Furthermore, Indonesia has several regulations pertaining to intellectual property. In 2000, three regulations were established: Republic of Indonesia Law Number 29 of 2000 on Plant Variety Protection, Republic of Indonesia Law Number 30 of 2000 on Trade Secrets, and Republic of Indonesia Law Number 32 of 2000 on Integrated Circuit Layout Designs. In 2014, Indonesia enacted Law Number 28 of 2014 on Copyright, followed by Republic of Indonesia Law Number 13 of 2016 on Patents and Republic of Indonesia Law Number 20 of 2016 on Trademarks and Geographical Indications in 2016.²⁶

Law No. 28 Year 2014 on copyright is the latest regulation of Law No. 19 Year 2002. If traced to the previous copyright law, there are many articles that tend to be interpreted in multiple interpretations, thus not ensuring legal certainty. In addition, this law also does not clearly describe the protection of economic rights and moral rights for creators and related rights holders. In addition, there are new aspects and innovations in society that need to be included in the revision of the Copyright Law.²⁷ At least there are differences between Law No. 19 of 2002 and the 2014 Copyright Law as follows:

Firstly, Longer Copyright Protection, The application of the duration of copyright protection is the focus of attention in the context of a comparison between the 2002 Copyright Act and the 2014 Copyright Act. In the 2002 Copyright Act, the copyright protection period was set for 50 (fifty) years after the death of the creator. However, the 2014 Copyright Law extends the protection period to 70 (seventy) years. The reason behind this extension is to further honour and protect the creators. By providing a longer period of protection, the creator has a greater opportunity to enjoy his/her economic rights. *Secondly*, Better Protection of Economic Rights, which provides better protection of the economic rights of the creators and/or owners of related rights. This includes restrictions on the transfer of economic rights in the form of sold flat. *Third*, Effective Dispute Resolution where the Copyright Act 2014 provides an effective dispute resolution mechanism through mediation, arbitration, or court processes. In addition, the application of the offence of complaint was introduced for criminal prosecution.²⁸

25 Hari Sutra Disemadi and Cindy Kang. "Tantangan Penegakan Hukum Hak Kekayaan Intelektual dalam Pengembangan Ekonomi Kreatif di Era Revolusi Industri 4.0." *Jurnal Komunikasi Hukum (JKH)* v, no. 1 v1-0ε : (2021). DOI: <https://doi.org/10.23887/jkh.v7i1.31457>, 60.

26 Agung Dwi Prabowo, "Aktualisasi Hak Asasi Budaya Dalam Pelindungan Hukum Dan Pelestarian Kekayaan Intelektual Komunal Dikaitkan Dengan Upaya Pemajuan Kebudayaan (Studi Kasus Ekspresi Budaya Tradisional Masyarakat Jawa Timur)." Tesis, Universitas Gadjah Mada, 2020.

27 Trias Palupi Kurnianingrum, "Materi Baru Dalam Undang-Undang Nomor 28 Tahun 2014 Tentang Hak Cipta (The New Material on Copyright Act Number 28 Year 2014)." *Negara Hukum: Membangun Hukum Untuk Keadilan Dan Kesejahteraan* 6, no. 1 (2016): 93-106. DOI: <https://doi.org/10.22212/jnh.v6i1.249>

28 *Ibid.*

Moreover, the importance of protection of traditional cultural expressions is emphasised in greater detail in the Copyright Act 2014. This update was initiated in response to the need to carefully regulate aspects related to traditional cultural expressions and copyright of works whose creators are unknown. Previously, despite being mandated by Article 10 of the Copyright Act 2002, its implementation was felt to be suboptimal. This is due to the absence of implementing regulations required by Article 10 paragraph (4) of the 2002 Copyright Law, which until now has not been issued by the Government. With a more detailed explanation in the 2014 Copyright Law, the main objective is to provide more effective protection to traditional cultural expressions. This effort is necessary as previously, this aspect has not received adequate attention from the Government. This update reflects the realisation of the importance of preserving and protecting the diversity of traditional cultural heritage that is the identity of society. Although Article 10 of the 2002 Copyright Law has contained related provisions, the reality is that its implementation has not been able to be optimal due to the absence of implementing regulations. Therefore, the 2014 Copyright Law seeks to fill this gap by regulating in more detail and comprehensively, creating a stronger legal foundation to protect traditional cultural expressions and related copyrights. This is in line with the spirit of ensuring that traditional cultural property is maintained and respected in an era of technological development and globalisation.

In addition, The first *sui generis* regulation for intellectual property protection in Indonesia was the law concerning plant varieties. This regulation, officially enacted in 2000 as Republic of Indonesia Law Number 29 of 2000 on Plant Variety Protection, is of particular significance in Indonesia due to its agricultural nature and tropical climate, which harbor vast diversity and richness of plant varieties. Varieties encompass various characteristics, including form, leaves, flowers, fruits, seeds, genotypes, and others, that serve as distinguishing features of a group of plants.

Regarding trade secrets, they are regulated under Republic of Indonesia Law Number 30 of 2000 on Trade Secrets. This regulation is a consequence of Indonesia's membership in the World Trade Organization (WTO). According to the aforementioned law, trade secrets refer to information not publicly known in the fields of technology and/or business, possessing economic value for commercial activities, and safeguarded as confidential by the owner of the trade secret.²⁹ Examples of trade secrets include production, processing, and sales methods or other economically valuable information in the technology and/or business domain that is not publicly disclosed.³⁰

There are seven principles to be protected in relation to trade secrets:³¹

29 Pasal 1 Undang-Undang RI Nomor 30 Tahun 2000 Tentang Rahasia Dagang.

30 Pasal 2 Undang-Undang RI Nomor 30 Tahun 2000 Tentang Rahasia Dagang.

31 Mila Bunga Hardani, "Perlindungan Hukum Kekayaan Intelektual Komunal Di Jawa Tengah," Skripsi, Fakultas Hukum Universitas Negeri Semarang 2020, 24-25.

- 1) The protected information must be in the fields of technology and business, not publicly known, possess economic value, and be kept confidential.
- 2) Protection under this regime does not require registration.
- 3) Trade secrets have no time limit of protection.
- 4) Exclusive rights to trade secrets can be transferred to heirs through inheritance, grants, wills, written agreements, and other legally authorized means.
- 5) Violations occur when someone intentionally discloses a trade secret and breaches written or unwritten agreements to maintain its confidentiality.
- 6) District Courts have jurisdiction over trade secret disputes.
- 7) Criminal provisions related to trade secrets fall under private prosecution.

During the same year, Indonesia introduced regulations pertaining to integrated circuit layout design, specifically the enactment of Law No. 32 of 2000 on Integrated Circuit Layout Design. Integrated circuit layout design refers to a finalized or partially completed product that contains various interconnected elements, with at least one of these elements being active, and is integrated within a semiconductor material to facilitate electronic functionality.³²

The regulations encompass nine key principles, including:³³

- 1) Legal protection is contingent upon registration.
- 2) Each registration application is intended for a single design.
- 3) The primary requirement is the originality of the design.
- 4) Due to rapid advancements, the granted protection extends for a period of 10 years.
- 5) Designs that contravene existing laws, public order, religion, or morality are ineligible for registration.
- 6) Cancellation of integrated circuit layout design registration can be initiated by the rights holder or through legal proceedings.
- 7) The Commercial Court possesses jurisdiction over cases involving integrated circuit layout design.
- 8) Rights holders have the option to pursue alternative dispute resolution mechanisms, such as arbitration, to settle legal conflicts.
- 9) The Integrated Circuit Layout Design Law includes provisions for criminal offenses that require a formal complaint.

Additionally, copyright regulations are outlined in Law No. 28 of 2014 on Copyright, which serves as the foundational legislation for copyright regulation in Indonesia. Copyright, as defined in Article 1, Paragraph 1 of the aforementioned law, refers to the automatic

32 Pasal 1 Undang-Undang RI Nomor 30 Tahun 2000 Tentang Desain Tata Letak Sirkuit Terpadu

33 Mila Bunga Hardani, "Perlindungan Hukum Kekayaan...", 22-23.

and declarative exclusive rights of creators upon the tangible manifestation of their work, subject to limitations specified by relevant statutes and regulations.³⁴

Those exclusive rights encompass both moral and economic rights.³⁵ Copyright protection applies to three categories of creations, namely:³⁶

- 1) All creations and related rights products by Indonesian citizens, residents, and legal entities.
- 2) All creations and related rights products by individuals or legal entities who are not Indonesian citizens, residents, or legal entities, but have their work first published in Indonesia.
- 3) All creations and/or related rights products and users of creations and/or related rights products by individuals or legal entities who are not Indonesian citizens, residents, or legal entities, provided that:
 - a) Their country has a bilateral agreement with the Republic of Indonesia regarding copyright and related rights protection, or
 - b) Their country and the Republic of Indonesia are parties or participants in the same multilateral agreement concerning copyright and related rights protection.

Moreover, the Copyright Law not only addresses individual creations but also communal creations. It specifically regulates the safeguarding of copyright for expressions of traditional cultural heritage. Article 38 stipulates the following:³⁷

- 1) The State holds the copyright for traditional cultural expressions.
- 2) The State is obligated to inventory, preserve, and protect traditional cultural expressions as outlined in paragraph (1).
- 3) The utilization of traditional cultural expressions mentioned in paragraph (1) must consider the prevailing societal values within the respective cultural context.
- 4) Further provisions concerning the State's copyright over traditional cultural expressions specified in paragraph (1) are detailed in Government Regulations.

In the year 2016, Indonesia enacted Law No. 13 of 2016 concerning Patents. According to the first article, first paragraph of the aforementioned law, a patent is defined as an exclusive right granted by the state to an inventor for a specific period of time, allowing them to exploit their technological invention independently or authorize others to do so.³⁸

The regulation categorizes patents into two types:³⁹ regular patents and simple patents. Regular patents are granted for novel inventions that involve an inventive step and have

34 Pasal 1 ayat (1) Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta.

35 Pasal 4 Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta.

36 Pasal 2 Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta.

37 Pasal 38 Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta.

38 Pasal 1 ayat (1) Undang-Undang RI Nomor 13 Tahun 2016 tentang Paten.

39 Pasal 2 Undang-Undang RI Nomor 13 Tahun 2016 tentang Paten.

industrial applicability. On the other hand, simple patents are granted for new developments or improvements of existing products or processes that can be applied in industry. In this context, an invention refers to the innovative solution devised by an inventor to address specific technological problems, manifesting as a product, process, or enhancement.⁴⁰

Moving on to trademarks, Indonesia has already established legislation in the form of Law No. 20 of 2016 concerning Trademarks and Geographical Indications. A trademark is defined in the first article, the first paragraph of the aforementioned law as a “graphically representable sign such as an image, logo, name, word, letter, number, color arrangement, two-dimensional or three-dimensional form, sound, hologram, or a combination thereof, used to differentiate goods and/or services produced by individuals or legal entities engaged in commercial activities.” The law encompasses both trademarks and service marks.⁴¹

Additionally, the same legislation governs geographical indications⁴², which are signs indicating the origin of a product and specific qualities, reputation, or characteristics associated with the product, primarily resulting from its geographical environment, including natural and human factors or their combination. The TRIPs controls geographical indicator protection as a separate intellectual property rights regime, whereas the TRIPs empowers member states to amend the laws relating to geographical indications in terms of quantity and quality of protection.⁴³

The definition of geographical indications in Indonesia is contained in Article 1 point 6 of Law Number 20 Year 2016 on Trademarks and Geographical Indications. Furthermore, specifically Article 70, stipulates the requirement for the central and/or local government to be active in protecting geographical indications. This signifies the importance of the government’s role in maintaining the authenticity and quality of products originating from a particular region, in line with the characteristics of the geographical environment and human factors that give the product its distinctive identity.

While the law provides a clear definition and protection for marks as “signs that can be displayed graphically” to distinguish goods and/or services, as well as geographical indications that indicate the region of origin of a good or product, it is important to look at how these aspects may interact with traditional cultural expressions. In the case of marks, while the definition includes elements such as images, logos and names, it is yet to be seen to what extent the law contextually accommodates marks associated with traditional cultural expressions. For example, do marks that reflect the traditional symbols or motifs

40 Pasal 1 ayat (2) Undang-Undang RI Nomor 13 Tahun 2016 tentang Paten.

41 Pasal 2 ayat (2) Undang-Undang RI Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis.

42 Pasal 1 ayat (6) Undang-Undang RI Nomor 20 Tahun 2016 Tentang Merek dan Indikasi Geografis.

43 Purnama Hadi Kusuma and Kholis Roisah. “Perlindungan Ekspresi Budaya Tradisional Dan Indikasi Geografis: Suatu Kekayaan Intelektual Dengan Kepemilikan Komunal.” *Jurnal Pembangunan Hukum Indonesia* 4, no. 1 (2022): 107-120. DOI: <https://doi.org/10.14710/jphi.v4i1.107-120>.

of a community receive appropriate protection? Further development in this regard can help protect and maintain the cultural heritage embodied in traditional brands. In addition, regarding geographical indications, although the law provides a comprehensive definition, it is still necessary to consider the extent to which the aspects of sustainability and preservation of traditional cultural expressions are reflected in the arrangement.

b. Communal Intellectual Property

The concept of communal intellectual property appears to diverge from the Western notion of intellectual property.⁴⁴ Intellectual property, as traditionally understood, is closely associated with the principles of TRIPS, emphasizing exclusive rights for exploiting copyrighted works. In contrast, the concept of communal intellectual property arises from a sense of collective spirit within a community regarding their creative works. The creative works present within the community are considered communal assets that can be used for the collective welfare and other shared objectives. Consequently, the concept of communal intellectual property fundamentally contradicts the principles and legal framework of intellectual property.⁴⁵

This discrepancy can be attributed to the interconnectedness of intellectual property law with various supporting factors. These factors encompass human rights law, natural resources law, environmental law, and the intellectual property legal framework itself. These elements act as catalysts for the emergence of communal intellectual property law. In other words, the establishment of communal intellectual property law does not easily align with the existing intellectual property legal framework. Communal intellectual property stems from the collective creative works of specific local communities, granting them rights based on shared interests and perspectives, commonly referred to as collective rights.⁴⁶

Collective intellectual property rights are a natural consequence of shared knowledge and collaborative creative works. The knowledge and creative works of a community hold immeasurable value, and their utilization aims to benefit the collective in terms of well-being, identity, and other invaluable aspects. Furthermore, the knowledge and creative works of these communities often exhibit a harmonious relationship with the natural environment.

The characteristics of communal intellectual property within a community or locality can be identified as follows:⁴⁷

- 1) Recognition of collective rights by the local or indigenous community over intellectual property.

44 J. Janewa OseiTutu, "A sui generis regime for traditional knowledge: the cultural divide in intellectual property law." *Marq. Intell. Prop. L. Rev.* 15 (2011): 147. SSRN: <https://ssrn.com/abstract=1574996>

45 Agung Dwi Prabowo, "Aktualisasi Hak Asasi Budaya...", 36.

46 *Ibid.*, 37-38.

47 *Ibid.*, 36.

2) Shared ownership involving collective participation in the management and utilization of intellectual property.

3) Preservation and safeguarding through traditional practices.

In the context of communal intellectual property, four main types can be distinguished:⁴⁸

1) Traditional knowledge

Traditional knowledge encompasses scientific and technological knowledge that forms an integral part of the cultural heritage inherited by traditional communities. This includes technical skills, concepts, learning, discoveries, and common practices that shape the way of life of traditional societies, including knowledge of ecology, agriculture, traditional medical practices related to healing, and knowledge of genetic resources.

2) Traditional cultural expressions

Traditional cultural expressions refer to various forms of cultural expression, whether tangible or intangible, including written forms, that embody distinctive characteristics of traditional cultural heritage passed down from generation to generation. Traditional cultural expressions are entrusted to the authority and/or custodians of the traditional community residing in a particular area, with a shared social value aimed at protecting, preserving, and developing them through traditional and intergenerational means.

3) Genetic resources

The regulation of genetic resources was initially addressed in the international Convention on Biological Diversity (CBD) in 1992. Genetic resources encompass tangible or potential genetic material found in plant germplasm, animals, and other organisms.

4) Geographical indications

Geographical indications refer to the origin or sign indicating that a product is originating from a specific geographical area. Factors such as geographical environment, natural resources, human factors, or their combination contribute to the distinct characteristics, reputation, quality, and other attributes of the produced goods.

The regulations concerning the various types of intellectual property mentioned above are found in multiple legislations. For instance, Article 38 of Law Number 28 of 2014 on Copyright explicitly addresses traditional cultural expressions. More recently, the Indonesian government issued Government Regulation Number 56 of 2022 on Communal Intellectual Property, which specifically governs communal intellectual property in Indonesia. This regulation provides a definition of communal intellectual property as intellectual property characterized by communal ownership and possessing economic value, while maintaining

48 Taufik H. Simatupang, "Initiating the Concept of Sui Generis of the Legal Protection of Communal Intellectual Property in the Philosophy of Science Perspective." *Jurnal Penelitian Hukum De Jure* 22, No. 2 (2022): 243-256, <https://dx.doi.org/10.30641/dejure.2022.V22.243-256>, 247-248.

the high moral, social, and cultural values of the nation.⁴⁹

Regarding the specific types, the aforementioned regulation covers a range of communal intellectual property, including traditional cultural expressions, traditional knowledge, genetic resources, geographical indications, and potential geographical indications.⁵⁰ The responsibility for their management is bestowed upon the state, which has the authority to inventory, safeguard, and preserve these assets. Consequently, the state bears the obligation to fulfill its duties towards intellectual property. The entities entrusted with this mandate include the Minister, non-ministerial government agencies, and/or Regional Governments.⁵¹

c. Traditional Cultural Expression

The regulation concerning traditional cultural expressions is enshrined in Law Number 28 of 2014 on Copyright. Specifically, Article 38 of the aforementioned law explicitly governs traditional cultural expressions. The provision stipulates the following:⁵²

- (1) The State holds the copyright over traditional cultural expressions.
- (2) The State is obligated to inventory, safeguard, and preserve traditional cultural expressions, as outlined in paragraph (1).
- (3) The utilization of traditional cultural expressions, as described in paragraph (1), must be mindful of the prevailing values within the developing society.
- (4) Further regulations regarding State-held copyright over traditional cultural expressions, as mentioned in paragraph (1), are established through Government Regulation.

Additionally, Law Number 28 of 2014 provides an explanation of Traditional Cultural Expressions within the elucidation of Article 38, paragraph (1). Traditional cultural expressions encompass various forms of cultural expression, either individually or in combination. The identified forms are as follows:

- 1) Verbal-textual expressions, encompassing both oral and written formats, such as prose and poetry, with diverse thematic and content compositions, including literary works and informative narratives.
- 2) Music, which includes vocal, instrumental, or combined forms.
- 3) Movement, which encompasses dance.

49 Pasal 1 ayat (1) Peraturan Pemerintah Republik Indonesia Nomor 56 Tahun 2022 Tentang Kekayaan Intelektual Komunal

50 Pasal 4 Peraturan Pemerintah Republik Indonesia Nomor 56 Tahun 2022 Tentang Kekayaan Intelektual Komunal.

51 Pasal 3 Peraturan Pemerintah Republik Indonesia Nomor 56 Tahun 2022 Tentang Kekayaan Intelektual Komunal.

52 Pasal 38 Undang-Undang Nomor 28 tahun 2014 tentang Hak Cipta.

- 4) Theatre, covering performances such as wayang (shadow puppetry) and folk plays.
- 5) Visual arts, including both two-dimensional and three-dimensional creations made from a wide range of materials such as leather, wood, bamboo, metal, stone, ceramics, paper, textiles, or their combinations.
- 6) Traditional rituals and ceremonies.

The World Intellectual Property Organization (WIPO) recognizes traditional cultural expressions held by community groups. At the national level, legal protection is regulated through various guidelines, including Law Number 28 of 2014 on Copyright. Hence, legal instruments remain an integral part of the copyright system, with the State bearing the responsibility of preserving all traditional wealth sources, as well as exploring and safeguarding their existing potential. It is emphasized that the State's responsibility for traditional cultural expressions, as stipulated in Article 38 of the Copyright Law, stems from the need to respect, preserve, and safeguard them while upholding customary values. The article also addresses additional provisions concerning State copyright over traditional cultural expressions, which are regulated by government regulations.

Furthermore, the Indonesian government has enacted government regulations concerning communal intellectual property, which encompass provisions regarding traditional cultural expressions. Article 1, paragraph (2), defines traditional cultural expressions⁵³ as all forms of creative works, tangible or intangible, individually or in combination, that signify the existence of a traditional culture held collectively and across generations.

An entity can be classified as a traditional cultural expression if it exhibits distinctive characteristics. The aforementioned government regulation also specifies the defining criteria of traditional cultural expressions, including:⁵⁴

- 1) They embody traditional values, perspectives, and forms that are developed, preserved, and evolved within and beyond the traditional context.
- 2) They are collectively embraced and upheld by indigenous customary law communities and/or local communities as their original community.
- 3) They undergo continuous development by the original community in response to the environment, nature, and historical factors.
- 4) They are preserved, utilized, and transmitted across generations.
- 5) They promote a sense of identity, continuity, and respect for cultural diversity and creativity.

53 Pasal 1 ayat (2) Peraturan Pemerintah Republik Indonesia Nomor 56 Tahun 2022 Tentang Kekayaan Intelektual Komunal

54 Pasal 6 Peraturan Pemerintah Republik Indonesia Nomor 56 Tahun 2022 Tentang Kekayaan Intelektual Komunal

1. The Concept of Legal Protection for Traditional Cultural Expressions in the Borderless Era in Indonesia

Legal safeguarding serves as a protective mechanism for the rights of individuals that may be infringed upon by others or entities, resulting in potential harm to the rightful owners, as stipulated by the prevailing legislative framework. Hence, the effectiveness of legal safeguarding relies on the presence of well-defined regulations that clearly delineate the parameters of rights violations perpetrated by external parties. This imperative stems from the overarching goal of legal safeguarding, which revolves around the preservation of individuals' rights and the prevention of legal transgressions. Consequently, the state assumes a pivotal role in ensuring the robustness of legal safeguards for its citizenry.

Categorically, legal protection safeguarding encompasses two primary modalities: repressive and preventive. Repressive legal safeguarding encompasses measures that impose sanctions or penalties upon those found guilty of contravening the law. Such punitive actions aim to instill a sense of deterrence among potential offenders, thereby curbing infringements on the rights of others. In contrast, preventive legal safeguarding adopts a proactive and precautionary stance. It involves the establishment of regulations that proactively demarcate boundaries on individual conduct, aiming to preclude instances of legal violations, conflicts, and disputes.⁵⁵

Within the realm of legal protection for communal intellectual property, with a particular focus on traditional cultural expressions, a combined approach of positive and defensive legal safeguarding strategies is deployed. Positive legal safeguarding signifies the enactment of legislation that unambiguously regulates the legal parameters surrounding this subject matter.⁵⁶ By doing so, it fortifies the assurance against infringements upon the rights of others. Complementary to this, defensive legal safeguarding adopts a non-binding or non-legal character, which complements the overall legal framework and amplifies the effectiveness of legal protection measures.⁵⁷

Defensive measures are employed to safeguard cultural expressions and prevent unilateral claims over traditional cultural heritage. The World Intellectual Property Organization (WIPO) employs the term misappropriation to denote the illegal use of intangible cultural assets, information, or ideas, that cannot be created, collected, or disseminated by an organization, with the aim of gaining competitive advantages or benefits without fair competition or the recognition of exclusive rights to such cultural works whose creators

55 Anak Agung Sinta Paramisuari and Sagung Putri ME Purwani. „Perlindungan Hukum Ekspresi Budaya Tradisional Dalam Bingkai Rezim Hak Cipta.“ Kertha Semaya: Journal Ilmu Hukum 7, no. 1 (2019): 1-16. DOI: <https://doi.org/10.24843/KM.2018.v07.i01.p04>.

56 Wilsen Patrick Tuuk, “Perlindungan Hak Kekayaan Intelektual (HKI) terhadap pengetahuan dan teknologi tradisional menurut Undang-Undang Nomor 13 Tahun 2016 tentang Paten.” *Lex Privatum* 0, no. 0 ,(2017) 8.

57 *Ibid.*

remain unidentified.⁵⁸

Moreover, the enactment of specific legislation in Indonesia governing traditional cultural expressions signifies a proactive legal framework for their protection. This framework provides mechanisms through which the diverse array of indigenous cultural works can be shielded, ensuring the continuous preservation of their cultural heritage. This is due to the collective ownership nature of traditional cultural expressions, wherein communal ownership takes precedence over individual ownership.

As a regulatory entity, the state assumes a vital role not only as an arbiter but also as a facilitator. It strives to strike a balance between various societal interests, demonstrating its commitment as a guardian.⁵⁹ This commitment is underscored by the provision in Article 38 of the Copyright Law, which designates the state as the holder of legal protection for traditional cultural expressions. Consequently, the state bears the responsibility of inventorying, safeguarding, and conserving the rich tapestry of traditional cultural expressions that exist within the Indonesian context.

Through this discourse, from the author's standpoint, there exist several cogent rationales for the legal safeguarding of traditional cultural expressions, as follows:

1) Utility and Public Benefit

The establishment of legal protections for traditional cultural expressions, whether through positive or defensive modalities, constitutes an endeavor rooted in the consideration of utility and the common good. This aspect assumes heightened significance for indigenous or local communities who coexist alongside these traditional works or creations. Indeed, it stands as a pivotal and imperative rationale, for the unilateral appropriation of their daily works or creations by irresponsible parties would engender adverse repercussions on their sustenance. This circumstance is especially critical within the present epoch of borderless interconnectedness, where national boundaries blur, rendering the prospect of claims, theft, and other forms of infringement exceedingly susceptible.

2) Identity and National Sovereignty

Regulatory frameworks pertaining to traditional cultural expressions effectively delineate Indonesia's distinctive identity, setting it apart from other nations. The rich diversity that characterizes its cultural fabric must be harnessed, protected, and preserved as a momentous national hallmark. Moreover, the Indonesian government's commitment to safeguarding traditional cultural expressions is a tangible manifestation of safeguarding national sovereignty. This holds profound significance as a preventive and punitive measure

58 Diah Imaningrum Susanti, "Eksplorasi Perlindungan Kekayaan Intelektual Komunal Berbasis Hak Asasi Manusia." (2022).

59 Fathoni. "Paradigma Hukum Berkeadilan Dalam Hak Kekayaan Intelektual Komunal." *Jurnal Cita Hukum* 7, no. 2 (2014). DOI: 10.15408/jch.v1i2.1469, 292.

in light of the legal protection of traditional cultural expressions within the current borderless milieu.

3) Ancestral Heritage Preservation

Yet another imperative for the imperative of legal safeguards surrounding traditional cultural expressions lies in the preservation of ancestral heritage, steeped in timeless life values. Works emanating from cultural traditions do not emerge in a vacuum; they embody the profound cultural values and sagacity of indigenous or local communities. Hence, the cultural values held dear by the Indonesian nation must not wane in the face of the relentless onslaught of globalization and the digital era. By regulating traditional cultural expressions, the preservation of ancestral heritage is fostered, thus ensuring its legacy to future generations.

4) Economic Instrumentality

Traditional cultural expressions possess the potential to serve as a fount of national revenue through the avenue of the creative economy. This consonant with the contemporary recognition of local wisdom as an economic asset brimming with value. Hence, as the custodian of communal intellectual wealth, the state can harness traditional cultural expressions to drive the creative economy, engendering financial gain and ameliorating the welfare of local indigenous communities.

Within the present digital epoch, heightened endeavors are requisite to safeguard traditional cultural expressions. The government can institute a digitally grounded data system to comprehensively catalog traditional cultural expressions across Indonesia. This strategic endeavor assumes paramount importance given the chequered trajectory of communal intellectual wealth within the Indonesian context. Furthermore, the government actively strives to safeguard and transmit collective spiritual wealth within the nation, pursuing further exploration, development, innovation, and layering of extant public intellectual wealth amid the constant evolution of technology. The resultant database not only furnishes vital information regarding the management of Indonesia's cultural wealth or heritage but also serves as an impervious bulwark against the potential abuse or claims asserted by foreign entities over intellectual property in Indonesia.

The current legal protection of cultural expressions in Indonesia reflects serious efforts to understand and protect the rich diversity of cultural heritage in the country. The 2014 Copyright Law has taken a positive step in recognising the importance of protecting traditional cultural expressions by providing more detailed provisions. However, there are still some aspects that require further attention and improvement.

Firstly, the implementation of legal protection of cultural expressions is still faced with practical challenges. Although the legal framework has been established, its effectiveness in

practice is often hampered by a lack of resources, legal knowledge at the community level, and the role of law enforcement agencies. Strengthening the legal and social infrastructure and increasing the capacity of relevant institutions are crucial steps.

Secondly, there is a need to further explore and accommodate types of cultural expressions that are not yet fully covered by the existing legal framework. In the context of globalisation and technological development, some forms of cultural expression may not be adequately accommodated, so policy review and updates may be required. Furthermore, raising public awareness on the importance of protecting cultural expressions needs to be a focus. Education on cultural rights and legal protection efforts undertaken by the government can help address the lack of awareness among communities about their cultural heritage.

Finally, cooperation between the government, local communities, and the private sector needs to be enhanced. This collaboration can create synergies to protect and preserve cultural expressions more effectively. With the active participation of various parties, it can be expected that the legal protection of cultural expressions in Indonesia will become more comprehensive and efficient. Through these updates and improvements, Indonesia can continue to maintain cultural diversity as a valuable asset that enriches national identity.

D. Closing

Traditional cultural expressions encompass various forms of creative works, whether tangible or intangible, or a combination thereof, that signify the collective and intergenerational preservation of traditional culture. They represent a communal intellectual wealth distinct from the individualistic nature of intellectual property. The regulation of traditional cultural expressions is indispensable, given their embodiment of ancestral heritage and cultural values.

Indonesia has enacted several legal frameworks pertaining to traditional cultural expressions. The Copyright Law Number 28 of 2014 explicitly acknowledges and governs the realm of traditional cultural expressions. The state assumes a pivotal role and responsibility in safeguarding these expressions. Furthermore, the Republic of Indonesia Government Regulation Number 56 of 2022 on Communal Intellectual Wealth encompasses provisions addressing traditional cultural expressions. Thus, the actions undertaken by the Indonesian government manifest a positive legal protection framework. Moreover, both proactive (preventive) and defensive (protective) measures are employed. The rational grounds for legal protection include considerations of utility, public benefit, national identity, sovereignty, ancestral preservation, and economic potential. These measures are of utmost significance in the contemporary borderless era, wherein the potential for claims, theft, and other violations becomes increasingly pronounced.

However, there are still some aspects that require further attention and improvement. First, the implementation of legal protection of cultural expressions is still faced with practical challenges. Its effectiveness in practice is often hampered by a lack of resources, legal knowledge at the community level, and the role of law enforcement agencies. Strengthening legal and social infrastructure and increasing the capacity of relevant institutions are crucial steps. Secondly, the need to further explore and accommodate types of cultural expressions has not been fully covered by the existing legal framework. Finally, co-operation between the government, local communities and the private sector needs to be enhanced.

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